Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 99-230
Competition in Markets for the Delivery	)	
of Video Programming	)	

COMMENTS

THE WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, INC.

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EXECUTIVE SUMMARY

The Wireless Communications Association International, Inc. ("WCA") applauds the Commission's efforts over the past year to promote competition through its adoption of rules that permit Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") licensees to make more flexible use of their spectrum, and its recognition that "access to premises" issues are critical for competitors. Yet a number of statutory and legal obstacles to competition remain which, if eliminated, would bring greater competition and consumer choice in the marketplace.

The Commission has recognized that cable programmers and wired cable MSOs are becoming increasingly consolidated and integrated. Indeed, should the Commission permit AT&T to acquire MediaOne in the wake of its recent acquisition of Tele-Communications, Inc. ("TCI"), it has been estimated that AT&T's common ownership of MediaOne and TCI would give AT&T ownership interests in cable systems serving approximately *60%* of all households in the United States. Despite these developments, the Commission has failed to refine its rules to address program access abuses that have resulted from these marketplace imbalances. WCA believes that full and fair access to programming ultimately cannot be achieved as long as the current program access rules apply only to networks in which a cable operator has an attributable interest and are delivered via satellite. The true source of the program access problem is cable's market power, which is the result of vertical *and* horizontal integration and a web of financial and operational relationships that include large entities that would not be considered vertically integrated in a traditional sense. It is therefore no coincidence that a number of cable networks that arguably do not qualify as "vertically integrated" under the statute are behaving *like* vertically integrated programmers and either refusing to sell their product to alternative MVPDs or making those offerings available only on discriminatory rates, terms and conditions. As such, the Commission should request that Congress eliminate the vertical integration requirmement from the program access statute and impose program access requirements on all cable programmers.

Compounding the problem, in recent program access cases the Commission has taken a narrow view of its own authority to deal with these new problems, which have given rise to just the sort of anticompetitive environment Congress intended to eliminate when it adopted the program access provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"). A growing problem is the accelerating trend toward migration of programming from satellite to terrestrial delivery as a means of evading the program access provisions of the 1992 Cable Act. The terrestrial migration problem is now a reality, and, absent a statutory amendment that expands the scope of the program access statute to programming delivered via terrestrial means, it is absolutely essential that the Commission clarify that such migration may be an "unfair practice" that "hinder[s] significantly or ... prevent[s] any

multichannel video programming distributor from providing satellite cable programming ... to subscribers or consumers."

Consolidation and clustering has led to tight cable MSO control over local distribution, giving rise to serious concerns that the Commission's current prohibition on exclusive broadcast retransmission consent agreements is insufficient to deter broadcasters from imposing discriminatory retransmission consent agreements on alternative MVPDs. The Commission should make clear to Congress that recently announced agreement between the National Association of Broadcasters and DirecTV *vis a vis* "local into local" legislation for the DBS industry present serious threats to consumer choice and competition in the broadband marketplace by permitting discriminatory retransmission consent arrangements.

WCA is hopeful that the Commission will address a number of barriers to competition in its on-going *Competitive Networks* proceeding. In particular, WCA applauds the speed with which the Commission has acted in requesting public comment on the issues raised in WCA's May 26, 1999 Petition for Rulemaking, which proposes to amend Section 1.4000 of the Commission's Rules to preempt any non-federal restriction that impairs the installation, maintenance or use of certain any over-the-air subscriber premises reception or transmission antennas. This proceeding involves a number of other significant access issues of great importance to MVPDs. Recognizing the controversy over the scope of the Commission's jurisdiction to address these access problems, it may be appropriate for the Commission to use this report to seek express jurisdiction to eliminate any question regarding its authority to remedy these problems.

Finally, while the Commission has made notable efforts in developing cable inside wiring rules, WCA believes that the Commission's inside wiring rules still do not give multiple dwelling unit owners sufficient certainty as to their rights upon termination of the incumbent's service, and further rule modifications are required. However, to the extent that the Commission believes that there are questions about its jurisdiction to regulate the disposition of "home run" wiring and direct a sale of that wiring prior to removal, the Commission can resolve them simply by recommending to Congress that Section 624(i) of the 1992 Cable Act (47 U.S.C. § 544(i)) be clarified to state unequivocally that the Commission has the requisite jurisdiction and the discretion to modify its rules, as previously proposed by WCA.

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The Wireless Communications Association International, Inc. ("WCA"), by its attorneys, hereby submits its comments in response to the Commission's *Notice of Inquiry* in the above-captioned proceeding.[1/]

I. INTRODUCTION

With its recent adoption of innovative new rules and policies in MM Docket 97-217 that permit Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") licensees to make more flexible use of their spectrum, the Commission has blazed the way for the rapid deployment of broadband wireless services utilizing MDS and ITFS spectrum.[2/] As the Commission has recognized in the *Notice of Inquiry*, new entrants to the wireless cable industry

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[1/] WCA is the principal trade association of the fixed wireless broadband communications industry. Its membership includes virtually every terrestrial wireless video provider in the Untied States; the licensees of many of the Multipoint Distribution Service ("MDS") stations and Instructional Television Fixed Service ("ITFS") stations that lease transmission capacity to wireless cable operators; Local Multipoint Distribution Service ("LMDS") licensees; Wireless Communications Service licensees; producers of programming; and manufacturers of wireless cable transmission and reception equipment.

[2/] *See Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service And Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, 13 FCC Rcd 19,112 (1998); *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service And Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, FCC 99-178, MM Docket No. 97-217 (rel. July 29, 1999).

have made headlines with their plans to develop high-speed data, video and other telecommunications services.[3/] Those new, non-video services may well raise additional regulatory issues that are beyond the scope of this proceeding, and which will not be addressed here. Nevertheless, the Commission should not lose sight of the fact that, to the extent that barriers to competition in the video marketplace remain, these barriers may well have the effect of denying entry to those competitors who intend to offer integrated bundles of communications services that include video.

It remains the case that many wireless cable operators continue to offer video services, using both traditional analog and more advanced digital technologies, in competition with wired cable operators. Within the past year, for example, BellSouth has launched an all-digital wireless cable television service with over 160 channels of local, cable and satellite programming to residential and commercial customers in Orlando, FL.[4/] BellSouth's Orlando launch was preceded by successful digital roll-outs in New Orleans and Atlanta,[5/] and GTE continues to offer digital wireless cable service in Honolulu. Non-local exchange carrier wireless cable competitors have also brought unique video service offerings to the video marketplace. Just last May, People's Choice TV Corp.

[3/] *See Notice of Inquiry*, at ¶11(c).

[4/] *See* "BellSouth Introduces Wireless Digital TV Service in Orlando," BellSouth News Release, dated Oct. 15, 1998 <http://www.bellsouthcorp.com/proactive/documents/render/21942.vtml> (viewed July 28, 1999).

[5/] *See id.; see also* Kanell, "'We Were Deluged All Day Long,' Hopeful Customers Flood Switchboard for BellSouth's Wireless TV Service," Atlanta Journal Constitution, at F1 (June 5, 1998). Analog technology also continues to be a vital method for the distribution of competitive video services by wireless cable operators large and small. In addition to its digital systems, BellSouth operates analog wireless cable systems in Louisville, KY, Ft. Myers, FL and Lakeland, FL.

("PCTV") and its subsidiary, SpeedChoice, unveiled a digital video service offering which allows consumers to customize their video channel line-ups using advanced interactive capabilities, as well as digital music, high-speed data networking and high-speed Internet access connections.[6/]

WCA applauds the Commission for its efforts to date to secure a competitive playing field among incumbent cable operators and alternative multichannel video programming distributors ("MVPDs"). For example, the Commission has properly recognized that "access to premises" issues are critical for competitors. Nevertheless, much work remains to be done to develop a level competitive playing field for the video marketplace. As is detailed below, significant marketplace developments -- ever increasing consolidation and integration among cable programmers and wired cable MSOs -- make the need to develop stronger program access rules and policies increasingly important for the development of video competition.[7/] These marketplace developments, in tandem with the Commission's narrow view of its own authority to deal with program access problems, have given rise to just the sort of anticompetitive environment Congress intended to eliminate when it adopted the program access provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").

[6/] *See* Taylor, "Digital TV Availability Expands in Valley," *Phoenix (AZ) Tribune*, at B1 (June 1999)(discussing SpeedChoice launch of 200 channel digital offering, including local broadcast TV stations and 40 music channels); "SpeedChoice Unveils 100% Digital 'Build Your Own Basic[sm]' Television and Music Programming Service," SpeedChoice News Release, dated May 3, 1999 <http://www.speedchoice.com/newsroom/1999/release050399.html> (viewed July 29, 1999).

[7/] *See infra* notes 9 - 16 and accompanying text (discussing recent consolidation and vertical integration trends). *See also* Moss, "Nets Fear Squeeze Play from Jumbo-Sized Ops," *Multichannel News*, at 1 (May 24, 1999) (reporting non-affiliated programmers' concerns that, because of cable consolidation, MSOs have "new-found leverage" over programmers).

Accordingly, WCA submits that consumers will not realize the full benefit of the Commission's pro-competitive agenda unless the Commission's actions are accompanied by legislative relief that decisively addresses the loopholes that have been created in the program access law. The Sixth Annual Report to Congress therefore must go beyond a factual analysis of marketplace trends and include specific recommendations that the 1992 Cable Act be modified to bring the current statutory framework into line with the existing competitive realities in the MVPD arena. To that end, WCA urges that the Commission do the following:

- recommend in its Report to Congress that Section 628 of the 1992 Cable Act (47 U.S.C. § 548) be amended to impose program access obligations on *all* cable networks, regardless of ownership or the method of delivery;

- support the adoption of legislation containing broader nondiscrimination language than that advocated by the National Association of Broadcasters in DirecTV, as those parties proposed in the context of their agreement on "local into local" legislation for the DBS industry;

- continue to act quickly on the proposed revisions to the antenna preemption rules as outlined in WCA's May 26, 1999 Petition for Rulemaking and the other proposals advanced in the *Competitive Networks* proceeding; and

- recommend that Congress amend Section 624(i) of the 1992 Cable Act (47 U.S.C. § 544(i)) to clarify that the Commission has jurisdiction over the disposition over "home run" wiring, and may adopt rules stating that where an MDU owner or competing provider wishes to purchase inside wiring prior to removal, the incumbent must sell the wiring to the MDU owner or competing provider at a price no higher than depreciated value.

II. DISCUSSION.

A. The Commission's Program Access Reforms Must Be Accompanied by an Amendment to the Program Access Statute To Impose Program Access Requirements On All Cable Networks, Not Just Satellite-Delivered Networks In Which a Cable Operator Has An Attributable Interest.

Cable industry consolidation continues at a blistering pace. This point was made just yesterday, by Commissioner Ness during the Commission's open meeting regarding ownership issues where she observed:

> The media landscape has changed enormously since I joined the Commission in 1994. There was the Telecommunications Act of 1996 -- which set the stage for significant consolidation of ownership ... . There is continued growth of cable, with system 'clustering' rapidly replacing the crazy quilt ownership patterns of the last twenty years in major metropolitan areas.[8/]

For example, should the Commission permit AT&T to acquire MediaOne in the wake of its recent acquisition of TCI, it has been estimated that AT&T's common ownership of MediaOne and TCI would give AT&T ownership interests in cable systems serving approximately *60%* of all households in the United States.[9/] Other MSOs have also intensified their efforts to

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[8/] *See* Separate Statement of Commissioner Susan Ness, *In re: Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221; Television Satellite Stations Review of Policy and Rules, MM Docket No. 87-8; Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, MM Docket No. 92-51; Reexamination of the Commissin's Cross-Interest Policy, MM Docket No. 87-154; Broadcast Television National Ownership Rules, MM Docket No. 96-222.* (Aug. 5, 1999).

[9/] *See* Statement of Senator Mike DeWine at the Joint Hearing of Senate Judiciary Committee and Antitrust, Business Rights and Competition Subcommittee, "Broadband: Competition and Consumer Choice in High-Speed Internet Services and Technologies" (July 14, 1999) (the "DeWine Statement"); Blumenstein and Cauley, "As Worlds Collide, AT&T Grabs a Power Seat," *Wall Street Journal*, p. B1 (May 6, 1999).

consolidate with each other, and as a result it has been estimated that the top seven MSOs now serve over 54.1 million subscribers (*i.e.*, 82% of all cable subscribers in the United States) and pass 87.1 million homes (*i.e.*, 92% of all homes passed).[10/] And, now Microsoft has recent invested $5 billion investment in AT&T which, along with Microsoft's 11% stake in Comcast, as part of an effort, in the words of one observer, to "extend its Windows operating system monopoly into every cranny of the computing industry," including digital set-top boxes.[11/] These investments give rise to every incentive for Microsoft to promote new capabilities that its systems may provide in a manner that most favors its affiliates. Clearly, these investments give rise to *de jure* relationships with the cable industry that require particular Commission scrutiny, and should be brought within the program access protections of 1992 Cable Act.

Concentration of ownership among cable operators, as the Commission has long recognized, is significant in the program access context because it increases the buying power of the major cable MSOs and facilitates their ability to coordinate their conduct.[12/] Congress also

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[10/] "Yankee Group Demands a Recount - Report Says Cable Industry Figures Don't Add Up," *PR Newswire* (June 11, 1999). *See also* Dugan, "AT&T Chief's $120 Billion Plan Capped by Deal for MediaOne," *The Washington Post*, p. E1 (May 6, 1999) (noting that Comcast's recent agreement with AT&T will eventually provide it with access to eight million subscribers); Mifflin, "Cox to Acquire TCA Cable for $3.26 Billion," *The New York Times*, p. C1 (May 13, 1999); "Paul Allen's Charter Acquires Two More MSOs," *MediaWeek* (May 31, 1999).

[11/] *See* J. Markoff, "Microsoft Hunts Its Whale, the Digital Set-Top Box: The AT&T Deal Furthers A Melding of PC, TV and Internet," *New York Times* at B1 (May 10, 1999).

[12/] *Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems*, 11 FCC Rcd 18223, 18322 (1996). *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd 24284, 24362 (1998) ("Although cable operators usually do not compete to serve the same subscribers in local downstream markets, they may have an incentive to coordinate their decisions in the upstream market for the purchase of programming on a national or regional level. Concentration of ownership among buyers in this

understands the effects of this problem on competition in the video marketplace; as Rep. Billy Tauzin succinctly put it, "[h]e who owns the programming rights [rules] the marketplace."[13/]

It will not be possible for the Commission to fully realize its ultimate goal of full and fair access to programming unless Congress expands the coverage of the current program access statute to cover *all* cable networks, regardless of ownership or method of delivery. Figures developed in the 1998 Annual Report to Congress underscore that the statute's focus on networks in which a cable operator holds an "attributable interest" has been outdated for some time: of the 245 national satellite-delivered cable programming services, 150, or 60%, are *not* "vertically integrated" and thus are not covered by the program access statute.[14/] More important, however, Congress's limitation of the statute to networks in which a cable operator holds an attributable interest fails to recognize the true source of the program access problem. The Commission itself noted to Congress that "[i]t is probably fair to say that the general conclusion is that any analysis *should focus on the source of any market power involved (the absence of competition at the local distribution level) rather than on vertical integration itself.*"[15/] It is therefore no coincidence that a number of cable networks that arguably do not

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market is one indicator of the likelihood that coordinated behavior among buyers will be successful.")(the "*Fifth Annual Report*").

[13/] Glick, "Tauzin Concerned About Cable Consolidation, Program Exclusivity," *Cable World*, at 1, 43 (Jul. 7, 1997).

[14/] *Fifth Annual Report*, 13 FCC Rcd at 24,321.

[15/] Letter from Chairman William E. Kennard to the Honorable W.L. (Billy) Tauzin, Responses to Questions at 3 (Jan. 23, 1998)(emphasis supplied)(the "Kennard Letter").

qualify as "vertically integrated" under the statute are behaving *like* vertically integrated programmers and refusing to sell their product to alternative MVPDs.

In addition, WCA is increasingly concerned by the accelerating trend toward migration of programming from satellite to terrestrial delivery as a means of evading the program access provisions of the 1992 Cable Act. The terrestrial migration problem is now a reality, and, absent a statutory amendment that expands the scope of the program access statute to programming delivered via terrestrial means, it is absolutely essential that the Commission clarify that such migration is an "unfair practice" that "hinder[s] significantly or . . . prevent[s] any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers."[16/]

WCA is particularly troubled by recent Commission rulings that have compounded the program access problem by seemingly legitimizing certain types of anti-competitive behavior by programmers. With the 1992 Cable Act, Congress charged the Commission with the

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[16/] 47 U.S.C. § 548(b). *See also* Umstead & Forkan, "*Rainbow Keeps New Services Exclusive,*" *Multichannel News*, at 1 (July 6, 1998) [discussing Rainbow Media Holdings' launch of cable-exclusive regional channels to be distributed via fiber in the New York tri-state area]; Letter from Chairman William E. Kennard to the Honorable W.L (Billy) Tauzin, Responses to Questions at 6 (Jan. 23, 1998) ["Programming that is used by a single system or group of interconnected systems is typically distributed terrestrially. . . [T]here . . . has been a trend toward a greater linkage of cable systems in regional clusters through fiber optic connections which are not much more generally available. These facilities, once in place, would typically have the capacity to distribute a number of channels of service."]; "The New Establishment - - Vanity Fair's Fifth Leaders of the Information Age," *Vanity Fair*, p. 166 (Oct. 1997) [discussing Comcast's migration of local cable sports programming from satellite to fiber]; Fabrikant, "As Wall Street Groans, A Cable Dynasty Grows," *New York Times*, Financial p. 1 (April 27, 1997) ["Even now, Cablevision is moving to circumvent a Federal requirement to share sports programming delivered by satellite with rivals in New York City. The law does not apply to programming services delivered by cable land lines, so the company is busily laying fiber-optic cables so it can switch its method of transmission."].

responsibility of adopting and enforcing program access rules to "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers."[17/] Recent Commission precedent, however, suggests that the Commission has abandoned this mandate and instead adopted an extremely limited view of its jurisdiction that *augments* cable's market power at the expense of full and fair competition in the market for multichannel video services.

This limited view is reflected in last fall's Cable Services Bureau decisions denying DirecTV's "satellite-to-terrestrial" migration complaint against Comcast SportsNet in the Philadelphia market.[18/] In that decision, the Bureau concluded that Comcast's actions in migrating certain SportsChannel Philadelphia programming from satellite to terrestrial delivery, did not qualify as an "unfair practice" under Section 628(b). In so doing, the Bureau appeared to send a strong signal to cable MSOs that they are free to engage in terrestrial migration and thereby evade their program access obligations, in the absence of a congressional directive eliminating the "terrestrial delivery" loophole in 1992 Cable Act.[19/] Although Congress is taking

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[17/] 1992 Cable Act, § 2(b)(5).

[18/] *See DirecTV, Inc. v. Comcast Corporation et al.*, 13 FCC Rcd 21822 (CSB, 1998) (migration of Philadelphia sports programming to fiber-delivered Comcast SportsNet).

[19/] Clearly this is not an isolated problem. A recent program access complaint filed by RCN Telecom Services of New York ("RCN") against Cablevision Systems Corporation ("Cablevision") alleges that Cablevision has migrated certain professional sports programming in the New York City market thereby denying RCN access to programming that had previously been available to it. *See RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation, et al.*, File No. CSR-5404-P (filed May 7, 1999) (migration of New York sports programming to fiber delivery). In its answer to RCN's complaint, Cablevision repeatedly cites the DirecTV/Comcast case as supporting authority for its refusal to sell the sports programming

steps to address this loophole,[20/] WCA believes that these efforts would be aided by a recommendation from the Commission in its Report to Congress that the "terrestrial delivery" loophole in 1992 Cable Act be eliminated.

Given the now well-documented program access difficulties alternative MVPDs continue to face in the wake of the 1992 Cable Act, and given the ongoing threat that migration of satellite-delivered networks to fiber will exclude even more cable programming from the scope of the law, WCA believes that Congress must act now to bring the statute into line with competitive and technological realities which it clearly did not contemplate seven years ago. Accordingly, for the reasons set forth above and in WCA's comments in the Commission's various other program access-related proceedings,[21/] WCA requests that the Commission include

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at issue to RCN. *See* Answer of Cablevision Systems Corporation re: File No. CSR-5404-P, at 14-15, 23-30 (filed June 4, 1999). This case also highlights the fact that consolidation has created a web of financial and operational relationships that pose serious threat to competition. Specifically, the case involves Cablevision's partnership with Fox that currently holds the rights to games played by the New York Mets, Yankees, Knicks, Rangers and Islanders, plus the New Jersey Nets and the New Jersey Devils --- in short, nearly of all of the professional sports teams followed by the average New York-area sports fan. The Commission's *laissez faire* approach to this problem, particularly in the wake of increased cable MSO consolidation, now poses a significant risk that consumers will lose access to regional sports and other popular cable *and* broadcast networks that are staples of television viewing.

[20/] *See* Video Competition and Consumer Choice Act of 1998, H.R. 4352, 105 Comp. § 3 (1988).

[21/] In its comments in CS Docket 97-248, WCA requested that the Commission amend its rules to (1) allow program access complainants to obtain discovery as a matter of right; (2) require that program access be resolved within a specific period of time from the close of the relevant pleading cycle; (3) impose a damages remedy in program access cases; and (4) declare that denial of programming to an alternative MVPD in conjunction with satellite-to-fiber migration is an "unfair practice" under Section 628(b) of the 1992 Cable Act and thus is actionable under the Commission's program access rules. *See WCA Program Access Comments* at 7-24.

in its Report to Congress a recommendation that Section 628 of the 1992 Cable Act be amended to apply the statute's program access requirements to *all* cable network programming, regardless of ownership or the method of delivery.

B. The Commission Should Recommend That Congress Enact Legislation Which Contains Strong Non-Discrimination Provisions For Retransmission Consent Agreements.

Consolidation and clustering has led to tight cable MSO control over local distribution, giving rise to serious concerns that the Commission's current prohibition on exclusive retransmission consent agreements is insufficient to deter broadcasters from imposing discriminatory retransmission consent agreements on alternative MVPDs at the behest of cable operators. Given the trends toward consolidation and system clustering, local stations are even more beholden to incumbent cable operators now than in 1993, when the Commission banned exclusive retransmission consent agreements.[22/]

Because consolidation among the cable MSOs is at an all-time high, incumbent cable operators enjoy enormous leverage during retransmission consent negotiations, and repeatedly use that leverage to force television broadcasters into retransmission consent agreements that discriminate against competing providers of multichannel video service. It therefore is no surprise that incumbent cable operators repeatedly demand and receive exclusivity from broadcasters where the Commission's rules allow them to do so. For instance, it is well known that NBC,

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[22/] *See Implementation of the Cable Television Consumer Protection and Competition Act - Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 3006 (1993) ("[I]n view of the concerns that led Congress to regulate program access and cable signal carriage agreements, we believe that it is appropriate to extend the same nonexclusivity safeguards to non-cable multichannel distributors with respect to television broadcast signals ... .").

which jointly owns the MSNBC cable network with Microsoft, surrendered exclusivity for MSNBC to incumbent cable operators in exchange for cable carriage of NBC broadcast stations.[23/] At least one major wireless cable operator has already advised the Commission of the unique and tangible anticompetitive effects of NBC's refusal to sell MSNBC to cable's competitors:

> Channels such as MSNBC . . . were created as a way for broadcasters to get something other than money for carriage of their free TV channels on cable. The cable industry demanded these channels be exclusive. Thus, today, companies like [wireless cable operator People's Choice TV Corp.], Ameritech, Wireless One and others are faced with NBC using its *free* television franchise to undermine cable competition. Celebrities like Tom Brokaw, Katie Couric, and Jane Pauley exhort viewers to tune to MSNBC as soon as they're done watching NBC, even though cable's competitors on the ground can't get MSNBC. The situation will grow worse as Microsoft introduces Windows 98, and places an MSNBC icon on each [personal computer]. The ability of new desktop PC's to process video can then be used by the monopoly software provider to push viewers to the monopoly video provider.[24/]

Similarly, as a *quid pro quo* for cable carriage of CBS and Fox broadcast stations, CBS and Fox have been forced to deny competing providers access to the Eye on People and FX cable networks, respectively. In other words, the broadcasters' willingness to succumb to the demands of incumbent

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[23/] *See, e.g.*, "Continental, Comcast to Pick Up Fox News," *Media Daily* (Sept. 25, 1996); "NBC's Wright Says Fox-Time Warner News Deal Imminent," *Media Daily* (July 15, 1996); Kennard Letter, Responses to Questions at 1. As WCA argued in its comments on the Commission's recent *Notice of Proposed Rulemaking* on its cable ownership attribution rules, NBC is able to do this by virtue of a loophole in Section 76.1000(b) of its Rules, which suggests that MSNBC is not a "vertically integrated" cable network even though Microsoft has a $1 billion, 11.5% non-voting interest in Comcast Cable and MSNBC cable platforms. *See* Comments of WCA, CS Docket No. 98-82, at 7-15 (filed Aug. 14, 1998).

[24/] Testimony of Matthew Oristano, Chairman, People's Choice TV Corp., before the Federal Communications Commission re: Status of Competition in the Multichannel Video Industry, at 7 (Dec. 18, 1997).

cable operators during retransmission consent negotiations is well documented, and will continue to threaten the competitive viability of cable's competitors unless and until Congress eliminates the problem once and for all.

In its upcoming report, the Commission should point out to Congress that recently announced agreement between the National Association of Broadcasters ("NAB") and DirecTV *vis a vis* "local into local" legislation for the DBS industry present serious threats to consumer choice and competition in the broadband marketplace. In letters to Chairman Bliley and other members of the House Committee on Commerce, WCA recently voiced its strong opposition to the NAB/DirecTV agreement.[25/] That agreement proposes to remove language from the House bill that prohibits television broadcasters from entering into retransmission consent agreements that discriminate against cable's competitors. Instead, the agreement would merely have Congress codify the FCC's existing rule prohibiting exclusive retransmission consent contracts.[26/] While the prohibition on exclusive retransmission consent agreements is a critical step in the right direction, the Commission should emphasize to Congress that the importance of retaining broad nondiscrimination language in the final legislation is necessary to ensure consumers' access to broadcast programming.

Codification of the FCC's rule prohibiting exclusive retransmission consent agreements is a wholly inadequate substitute for the broader nondiscrimination language already in the House bill.

[25/] *See, e.g.,* letter from Andrew Kreig, President, WCAI, Inc., to Hon. Thomas J. Bliley (July 9, 1998) (regarding the Satellite Competition and Consumer Protection Act). For the Commission's convenience, a copy of that letter is attached hereto as Exhibit A.

[26/] *See* 47 C.F.R. § 76.64(m)

The Commission's rule arguably only prohibits a local television station from entering into an agreement that by its express terms gives an incumbent cable operator an exclusive right to carry the broadcaster's signal. As currently enforced by the FCC, the rule does not prevent an incumbent cable operator from achieving *de facto* exclusivity or significantly hindering competition by requiring a broadcaster to offer competing providers retransmission consent on unreasonable terms and conditions not required of the cable operator itself. Such unreasonable terms and conditions would include, for example, a requirement that a competing provider carry the broadcaster's primary signal *and* all of the broadcaster's cable networks and new digital broadcast services as a precondition for retransmission consent. The nondiscrimination language in the House bill would prohibit this type of discriminatory behavior, and therefore the Commission should recommend that it be retained in the final version of any "local into local" legislation approved by Congress.

C. The Commission Should Continue To Act Quickly On The Antenna Preemption And Other Access To Premises Issues Raised in the Competitive Networks Proceeding, And Should Request Clarification of Its Jurisdiction In Those Areas Where There May Be Doubt As To The Scope of The Commission's Authority.

The Commission has demonstrated its strong commitment to improving the competitive environment for MVPDs in multiple dwelling units, and has clearly identified fixed broadband providers as a likely source of potential facilities-based competition to incumbents. As Thomas Sugrue, Chief of the Wireless Telecommunications Bureau, recently observed in testimony before Congress:

> [S]ervice providers are now offering fixed voice telephony and high-speed Internet access services over spectrum in the [DEMS] and 39 GHz bands. The Commission also recently auctioned Local Multipoint Distribution Service spectrum in the bands around 28 GHz, which should result in a significant number of new licensees offering fixed wireless services over the next few years.

> It appears that all of these spectrum bands will likely be used primarily for broadband telecommunications applications, although licensees can provide video programming services over this spectrum as well. Because their technology enables them to avoid the installation of new wireline networks, wireless service providers may be among those with the greatest potential quickly and efficiently to offer widespread competitive facilities-based services to end users.[27]

The Commission has moved decisively in a number of areas to promote the prospects for competition in the video marketplace. Within the past three years, the Commission has adopted comprehensive rules to provide MVPDs greater access to cable "home run" wiring within multiple dwelling units ("MDUs");[28] amended its antenna preemption rule (Section 1.4000) to preempt non-federal restrictions on installation, use or maintenance of certain types of fixed wireless antennas used to receive multichannel video services in MDUs (the "Antenna Preemption Rule");[29] and, just recently, proposed to adopt new rules that would ensure that broadband providers would enjoy nondiscriminatory access to MDU property where they provide telecommunications services (the "*Competitive Networks*" proceeding).[30]

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[27] Statement of Thomas Sugrue, Chief, Wireless Telecommunications Bureau, before the Subcommittee on Telecommunications, Trade and Consumer Protection, United States House of Representatives, re: Access to Buildings and Facilities by Telecommunications Providers (May 13, 1999).

[28] *See Telecommunications Services Inside Wiring - Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd 3659 (1997) (the "*Inside Wiring Order*").

[29] *See Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast; Multichannel Multipoint Distribution and Direct Broadcast Satellite Services*, 13 FCC Rcd 23874 (1998).

[30] *See Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Cellular Telecommunications*

The issues raised in the *Competitive Networks* proceeding will have a significant impact on the state of competition in the video marketplace since to the extent that barriers to competition in the video marketplace remain, these barriers may well have the effect of denying entry to those competitors who intend to offer integrated bundles of communications services that include video services. WCA appreciates the great speed with which the Commission acted in requesting in the *Competitive Networks NPRM* public comment on the issues raised in WCA's May 26, 1999 Petition for Rulemaking, which proposes to amend Section 1.4000 of the Commission's Rules to preempt any non-federal restriction that impairs the installation, maintenance or use of any over-the-air subscriber premises reception or transmission antenna that is one meter or less in diameter or diagonal measurement and is deployed to provide any type of fixed wireless service, subject to the exceptions for safety and historic preservation already included in Section 1.4000.[31/]

The fact remains, however, that fixed wireless providers cannot meet the accelerating demand in the marketplace for high-capacity transmission links if local governments, property owners and homeowners associations prevent installation, use and maintenance of the antennas and wiring necessary to terminate those links at the end user's premises. Simply stated, access to rooftop areas and internal wiring *is* access to the subscriber in the MTE environment.

Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, WT Docket No. 99-217, CC Docket 96-98, FCC 99-141 (rel. July 7, 1999)(the "*Competitive Networks NPRM*").

[31/] *See id.* at ¶69.

Congress and the Commission have recognized as much, and thus in the multichannel video context the Commission has made incremental progress toward maximizing the ability of fixed wireless competitors to access areas within or adjacent to a tenant's individual unit.[32/] The proposals in the *Competitive Networks NPRM*, which are designed to provide fixed wireless operators and others with nondiscriminatory access to multiple tenant environments ("MTEs") where they provide telecommunications services, represent the next and perhaps most critical phase of that process.

WCA acknowledges that there continues to be considerable controversy over the scope of the Commission's jurisdiction to address fully the MTE access problems.[33/] To the extent that its report to Congress provides an opportunity to seek clarification on the extent of the Commission's express and ancillary jurisdiction under the Telecommunications Act of 1996 and the Communications Act, the Commission should use its report to Congress as an opportunity to request congressional authority over these matters.

D. The Commission Should Recommend That Congress Adopt a Clarifying Amendment to Section 624(i) of the 1992 Cable Act

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[32/] *See, e.g., Implementation of Section 207 of the Telecommunications Act of 1996 - Restrictions on Over-the-Air Reception Devices, Television Broadcast and Multichannel Multipoint Distribution Service*, 13 FCC Rcd 23874 (1996) (extension of antenna preemption rule to antennas used to receive video programming services on rental property); *Telecommunications Services - Inside Wiring*, 13 FCC Rcd 3659 (1997) (adoption of cable home wiring and cable home run wiring rules for multichannel video providers in multiple dwelling units).

[33/] *See* Separate Statement of Commissioner Susan Ness In Regard to the *Competitive Networks NPRM* (July 7, 1999); Statement of Commissioner Harold Furchtgott-Roth, Concurring in Part and Dissenting in Part In Regard to the *Competitive Networks NPRM* (July 7, 1999); Separate Statement of Commissioner Michael K. Powell, Concurring In Regard to the *Competitive Networks NPRM* (July 7, 1999).

That Removes Any Doubts As to The Commission's Jurisdiction Over "Home Run" Wiring and Its Authority To Adopt Rules Giving MDU Owners or Alternative MVPDs An Opportunity To Purchase Inside Wiring at Depreciated Value Before It is Removed.

WCA applauds the Commission's efforts to establish comprehensive cable inside wiring rules, since resolution of inside wiring issues is absolutely necessary if MDU owners and alternative MVPDs are to have any kind of certainty as to the "rules of the road" when a building owner or an individual tenant wishes to switch service providers. In this regard, there is little question that the Commission's new rules and policies governing "home run" wiring (*i.e.*, the wiring specifically dedicated to providing service to an individual tenant's unit, running from the cable home wiring demarcation point (twelve inches outside the tenant's unit) to the junction box) represent a critical first step toward achievement of full and fair competition in the MDU environment.[34/]

Nonetheless, as set forth in WCA's Petition for Reconsideration with respect to Report and Order and Second Further Notice of Proposed Rule Making,[35/] WCA believes that the Commission's inside wiring rules still do not give MDU owners sufficient certainty as to their

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[34/] For example, consistent with a proposal put forth by WCA, the Commission will now require an incumbent cable operator to enforce its "legal right to remain" by obtaining a court order or injunction within 45 days of receiving notice that the MDU owner intends to give a competitor access to the building. *Inside Wiring R&O*, 13 FCC Rcd at 3698. In addition, incumbents must now decide how they want to dispose of their "home run" wiring within a specific period of time after notice of termination from the MDU owner and, more generally, must cooperate with the MDU owner and the competitor so that a seamless transition of service may take place. *Id.* at 3680-89.

[35/] WCA Petition for Reconsideration re: CS Docket No. 95-184 and MM Docket No. 92-260 (filed Dec. 15, 1997) [the "*WCA Inside Wiring Petition*"].

rights upon termination of the incumbent's service, and thus will not materially improve competition in the MDU environment unless the Commission adopts WCA's suggested rule modifications. In WCA's view, the heart of the problem is the Commission's failure to recognize that the cost of cable inside wiring lies primarily in installation and not in the wiring itself, and that the salvage value of coaxial cable pales in comparison to the cost of removing the wiring and restoring the premises to their former condition. Structural limitations, fear of property damage, and related aesthetic considerations often discourage an MDU property owner from allowing multiple providers onto his or her property unless existing wiring can be re-used. Thus the marketplace reality is this: *if MDU owners fear that incumbent cable operators will elect to remove their home run wiring and force a competitor to postwire the premises, the MDU owner often will deny access to competing service providers.*

The "postwiring" problem will continue to burden cable's competitors for the foreseeable future as long as incumbents are permitted to remove their wiring before the MDU owner (or, if he or she so designates, the competing provider) has an opportunity to purchase it. Accordingly, WCA has recommended that the Commission adopt a rule stating that if the MDU owner or successor MVPD wishes to purchase the incumbent's home run wiring, it should have the right to do so at a price equal to depreciated value.[36/] It should be noted that WCA is *not* suggesting that an incumbent should not receive just compensation for its wiring. To the

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[36/] *See* WCA Reply to Oppositions to Petition for Reconsideration, CS Docket No. 95-184 and MM Docket No. 92-260, at 7 (filed Jan. 28, 1998). Conversely, if the MDU owner or the successor MVPD elects not to purchase the incumbent's home run wiring, the incumbent should be free either to remove the wiring and restore the premises to its prior condition, or abandon the wiring. *Id.*

contrary, in this case "just compensation" equals the wiring's depreciated value.[37/] That is all that incumbent cable operators are entitled to under the Fifth Amendment, and thus WCA's proposal does not raise any Fifth Amendment "takings" issue.

The Commission has already ruled that it has jurisdiction to regulate the disposition of an incumbent cable operator's home run wiring, and WCA believes that ruling is correct.[38/] The cable industry, however, has argued otherwise, and has already appealed the *Inside Wiring R&O* to the United States Court of Appeals for the Eighth Circuit, where it is likely to raise a direct challenge to the Commission's finding of jurisdiction.[39/] Furthermore, to the extent that the Commission has suggested that it may have lingering doubts about its jurisdiction to regulate the disposition of "home run" wiring and direct a sale of that wiring prior to removal, the Commission can resolve them simply by recommending to Congress that Section 624(i) of the 1992 Cable Act (47 U.S.C. § 544(i)) be clarified to state unequivocally that the Commission has the requisite jurisdiction and the discretion to modify its rules.[40/]

[37/] *See id.* at 8-9.

[38/] *Inside Wiring R&O*, 13 FCC Rcd at 3700-09.

[39/] *Charter Communications, Inc. v. FCC*, Case No. 97-4120 (8th Cir., filed Nov. 24, 1997).

[40/] In addition, for the reasons set forth in the *WCA Inside Wiring Petition* and in WCA's subsequent pleadings related thereto, WCA continues to urge the Commission to preempt discriminatory state mandatory access statutes that give incumbent cable operators but not their competitors a right to enter MDU property. WCA also asks that the Commission (1) prohibit an incumbent cable operator from disconnecting my wiring unless and until the new provider has entered the property, connected its own wire and is ready to provide service; (2) adopt a shorter procedural timetable for disposition of home run wiring where an MDU owner allows the incumbent and the new entrant to compete head-to-head in the same building; and (3) clarify that existing contractual provisions regarding disposition of home run wiring are *not* grandfathered to the extent that they are less favorable to

III. CONCLUSION.

Continuing consolidation in the cable industry continues to pose serious threats that an oligarchy of horizontally- and vertically-integrated cable interests will continue to keep competition at bay to the detriment of American video consumers. WCA is heartened that the Commission is attempting to level the competitive playing field. However, it has become clear that the Commission's vision of providing consumers with a *bona fide* choice of MVPD providers cannot come to fruition absent Commission action, perhaps in conjunction with additional legislation. WCA strongly believes that, if the Commission advances the above-described legislative recommendations, the Commission will have laid a solid foundation for competition in the video marketplace. WCA thus urges the Commission to take actions and make the recommendations to Congress described herein.

Respectfully submitted,

THE WIRELESS COMMUNICATIONS
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August 6, 1999

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cable's competitors than the Commission's rules.

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"Providing broadband video, voice and data services"

July 9, 1999

VIA HAND DELIVERY
The Honorable Thomas J. Bliley
Chairman
Committee on Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Re: The Satellite Competition and Consumer Protection Act

Dear Chairman Bliley:

On behalf of The Wireless Communications Association International, Inc. ("WCA"), I am writing to express our strong opposition to the recently announced agreement between the National Association of Broadcasters ("NAB") and DirecTV *vis a vis* "local into local" legislation for the DBS industry. For the reasons set forth below, the agreement's provisions with respect to retransmission consent will reduce consumer choice and defeat Congress's overriding objective of promoting competition in the broadband marketplace.

WCA is the trade association of the fixed wireless communications industry, representing a broad array of entities engaged in the provision of competitive video, voice and data services via fixed wireless broadband technology. Many fixed wireless providers are or will soon be offering multichannel video programming service in direct competition with incumbent cable operators, either as a primary product offering or as part of a larger package of services that might include, for example, high-speed Internet access and/or voice services. These providers cannot compete effectively against the cable MSOs without nondiscriminatory access to local broadcast programming. Yet the NAB/DirecTV agreement would remove language from the House bill that prohibits television broadcasters from entering into retransmission consent agreements that discriminate against cable's competitors. Instead, the agreement would merely have Congress codify the FCC's existing rule prohibiting exclusive retransmission consent contracts (47 C.F.R. § 76.64(m)).

While the prohibition on exclusive retransmission consent agreements is a critical step in the right direction, the importance of retaining the nondiscrimination language in the House bill should not be underestimated. Consolidation among the cable MSOs is at an all-time high, increasing cable's already substantial control over distribution of multichannel video programming in local markets. Incumbent cable operators thus enjoy enormous leverage during retransmission consent

negotiations, and repeatedly use that leverage to force television broadcasters into retransmission consent agreements that discriminate against competing providers of multichannel video service. For example, it is well known that incumbent cable operators forced NBC to deny competing providers access to the MSNBC cable network as a *quid pro quo* for carriage of NBC broadcast stations. Similarly, as a *quid pro quo* for cable carriage of CBS and Fox broadcast stations, CBS and Fox have been forced to deny competing providers access to the Eye on People and FX cable networks, respectively. In other words, the broadcasters' willingness to succumb to the demands of incumbent cable operators during retransmission consent negotiations is well documented, and will continue to threaten the competitive viability of cable's competitors unless and until Congress eliminates the problem once and for all.

Codification of the FCC's rule prohibiting exclusive retransmission consent agreements is a wholly inadequate substitute for the nondiscrimination language already in the House bill. That rule arguably only prohibits a local television station from entering into an agreement that by its express terms gives an incumbent cable operator an exclusive right to carry the broadcaster's signal. As currently enforced by the FCC, the rule does not prevent an incumbent cable operator from achieving *de facto* exclusivity or significantly hindering competition by requiring a broadcaster to offer competing providers retransmission consent on unreasonable terms and conditions not required of the cable operator itself. Such unreasonable terms and conditions would include, for example, a requirement that a competing provider carry the broadcaster's primary signal *and* all of the broadcaster's cable networks and new digital broadcast services as a precondition for retransmission consent. The nondiscrimination language in the House bill should prohibit this type of discriminatory behavior, and it therefore is absolutely essential to WCA's members that it be retained in the final version of any "local into local" legislation approved by Congress.

Thank you for your attention to this matter. Should you or your staff have any questions, please do not hesitate to contact me directly.

Very truly yours,

Andrew Kreig

Andrew Kreig
President